

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL L. JOHNSON
Claimant

VS.

**UNITED EXCEL CORPORATION; DORE
& ASSOCIATES CONTRACTING CO.,
INC.; and DEMOLITION
CONTRACTORS, INC.**
Respondents

Docket Nos. 1,020,816 &
1,022,692

AND

**BUILDERS' ASSOCIATION SELF-
INSURERS' FUND and TRAVELERS
INDEMNITY CO.**
Insurance Carriers

ORDER

STATEMENT OF THE CASE

Respondent United Excel Corporation (United Excel) and its insurance carrier Builders' Association Self-Insurers' Fund (Builders) requested review of the June 6, 2007, Award and the June 8, 2007, Award Nunc Pro Tunc entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on September 12, 2007. Angela L. Williams, of Kansas City, Missouri, appeared for claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent United Excel and its insurance carrier, Builders. Theresa A. Otto, of Kansas City, Missouri, appeared for insurance carrier, Travelers Indemnity Co. (Travelers). There was no appearance by respondent Dore & Associates Contracting Co., Inc. (Dore), or by respondent Demolition Contractors, Inc. (Demolition Contractors).

The two docket numbers assigned to this single accident are the result of claimant having filed separate Applications for Hearing (Form E-1) naming different employers (principal versus subcontractor). These claims were consolidated for trial and award.

In the original Award, the Administrative Law Judge (ALJ) awarded claimant a 19 percent permanent partial impairment of the left foot against respondent United Excel and its insurance carrier, Builders, and against respondent Dore and Travelers. The ALJ did not include Demolition Contractors. But the ALJ also noted that United Excel was “authorized to retain all rights of subrogation to this award against the various subcontractors involved, [to be heard] in a more convenient forum.”¹ However, in his Award Nunc Pro Tunc, although the ALJ again made the same two respondents, United Excel and Dore, jointly and severally liable, and again included the insurance carrier, Builders, he excluded Travelers.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR OF the Claimant, Michael L. Johnson, and against the Respondent[s], United Excel Corporation and Dore and Associations Contracting, and United Excel Corporation’s Insurance Carrier, Builders Assoc. Self Insurers Fund of Kansas.²

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

United Excel/Builders request review of the issue of which party or parties are responsible for payment of the benefits awarded to claimant. United Excel/Builders argue that either Dore or Demolition Contractors should be compelled to honor their contractual and statutory obligations to provide workers compensation benefits for claimant. United Excel/Builders also argue that Travelers should be estopped from denying coverage of Demolition Contractors.

Travelers contends that the workers compensation policy issued by Travelers to Demolition Contractors does not provide coverage for claimant’s injury. Travelers asserts that the ALJ did not err in ordering workers compensation benefits to claimant to be paid by United Excel and Builders.

Claimant states that he has proven by a preponderance of the evidence that he suffered a compensable injury while working for Demolition Contractors on November 4, 2007. Claimant argues the only issue is who will pay the benefits, and he has no position on that question so long as benefits are paid by someone.

The issue for the Board’s review is: Which respondent and/or insurance carrier is responsible for payment of workers compensation benefits awarded to claimant?

¹ ALJ Award (June 6, 2007) at 6.

² ALJ’s Award Nunc Pro Tunc (June 8, 2007) at 1-2.

FINDINGS OF FACT

United Excel is a commercial general contractor specializing in hospital and medical construction. On May 25, 2004, United Excel entered into a contract with Providence Medical Center to demolish the old Bethany Hospital in Kansas City, Kansas. Troy Bechtel was the senior project manager of the Bethany Hospital project. The contract between United Excel and Providence Medical Center required United Excel to purchase and maintain workers compensation insurance coverage meeting statutory limits mandated by state and federal laws.

United Excel subsequently contracted with Dore, a Michigan company, to undertake the demolition work on the project. There was language in that contract requiring Dore to have workers compensation coverage for its employees. The contract further states that Dore will require sub-subcontractors it may hire to procure adequate insurance to cover its portion of the insurance requirements. Dore provided United Excel with a certificate indicating it had workers compensation coverage.

Subsequently, Dore contracted with DemCon³, a Nebraska company, to perform the actual demolition on the Bethany Hospital site. That contract required DemCon, at its own expense, to "procure and maintain in force, on all its operations, insurance as required by the Contract Documents but in no event less than the following coverages and limits: Workers' Compensation: Statutory."⁴

There was never a contract between United Excel and DemCon or Demolition Contractors. Dore had an on-site supervisor who coordinated and communicated daily activities with a representative of Demolition Contractors. Demolition Contractors' employees were the ones doing the actual demolition work.

The Certificate of Insurance Dore provided to United Excel on September 7, 2004, showed that Dore had coverage with Nautilus Insurance Company (Nautilus) through April 2005. A Certificate of Insurance produced on behalf of Demolition Contractors to Dore revealed it had coverage from August 19, 2004, through August 19, 2005, with Travelers. United Excel relied upon those certificates of insurance to believe both Dore and Demolition Contractors had the necessary workers compensation insurance coverage. United Excel neither asked for nor received copies of the actual insurance policies.

³ Although Dore contracted with a company named DemCon, United Excel never received a Certificate of Insurance listing DemCon as a named insured. The Certificate of Insurance received by United Excel showed Demolition Contractors as the insured. Claimant testified he was hired by Demolition Contractors. Mr. Bechtel believed that DemCon was an acronym for Demolition Contractors, but he admitted he did not know if they were two separate entities.

⁴ Bechtel Depo., Ex. 3 at 5.

Included as part of the Workers Compensation and Employers Liability Policy issued by Travelers to Demolition Contractors is a **Nebraska Limited Other States Endorsement**. That endorsement states that Demolition Contractors was eligible for extra-territorial coverage if (1) the work was performed by Nebraska employees, (2) the duration of the work being performed in a state other than Nebraska did not exceed 90 days, and (3) the laws of that state did not require it to secure separate coverage before beginning operations in that state. The insurance does **not** apply (1) to any employee unless his or her employment was principally localized in Nebraska; (2) to any person claiming benefits under the workers compensation law of any state which required Demolition Contractors to obtain insurance coverage in such state before beginning work; (3) to out of state employees who are hired to perform work in a state other than Nebraska; or (4) if Demolition Contractors' operation in any state other than Nebraska exceeds 90 continuous calendar days.

Claimant, who resides in Paola, Kansas, was employed by Demolition Contractors as an operator/master mechanic to work in Kansas at the Bethany Hospital job site. He was notified of the job through his local union. He had been working for Demolition Contractors for about a month when, on November 4, 2004, a bobcat bucket fell on his left foot. Claimant went to the KUMC emergency room and was treated for a broken second metatarsal bone. He returned to work the same day. He was treated for several months by Dr. Vincent Key but was able to continue working. His medical bills were paid by Demolition Contractors. He was evaluated by Dr. Pedro Murati, who rated him as having a 19 percent permanent partial impairment to his left foot.

Claimant interviewed for the job with Demolition Contractors at the Bethany Hospital site and accepted the job at the job site. He worked for Demolition Contractors a little over a year, all of it at the hospital site in Kansas. Demolition Contractors did not have an actual office in the state of Kansas, other than a construction trailer at the site. The owner of Demolition Contractors would drive from Nebraska to Kansas every Thursday to bring paychecks. Claimant received paychecks from Demolition Contractors. Sometimes, however, his paychecks would bounce and when they did, he would be issued a check from DemCon, Inc., or Jim's Auto Repair.

In early June 2005, Mr. Bechtel was contacted by the Kansas Division of Workers Compensation. He was advised that the Division had investigated a complaint and determined that Demolition Contractors did not have a valid workers compensation policy for workers to be performing work in Kansas. On June 16, 2005, Mr. Bechtel authored a letter to Dore giving it official notice to stop work because of noncompliance with Kansas' requirement to have a valid workers compensation insurance policy in effect. After he sent this letter, Demolition Contractors did not work on the Bethany Hospital site again. Before being contacted by the Division, Mr. Bechtel relied on the Certificates of Insurance and believed his subcontractor and its sub-subcontractors had the required insurance coverage.

PRINCIPLES OF LAW

K.S.A. 44-503 states:

(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

(b) Where the principal is liable to pay compensation under this section, the principal shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of this section, and shall have a cause of action under the workers compensation act for indemnification.

(c) Nothing in this section shall be construed as preventing a worker from recovering compensation under the workers compensation act from the contractor instead of the principal.

(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under the principal's control or management, or on, in or about the execution of such work under the principal's control or management.

(e) A principal contractor, when sued by a worker of a subcontractor, shall have the right to implead the subcontractor.

(f) The principal contractor who pays compensation to a worker of a subcontractor shall have the right to recover over against the subcontractor in the action under the workers compensation act if the subcontractor has been impleaded.

(g) Notwithstanding any other provision of this section, in any case where the contractor (1) is an employer who employs employees in an employment to which the act is applicable, or has filed a written statement of election with the

director to accept the provisions of the workers compensation act pursuant to subsection (b) of K.S.A. 44-505, and amendments thereto, to the extent of such election, and (2) has secured the payment of compensation as required by K.S.A. 44-532, and amendments thereto, for all persons for whom the contractor is required to or elects to secure such compensation, as evidenced by a current certificate of workers compensation insurance, by a certification from the director that the contractor is currently qualified as a self-insurer under that statute, or by a certification from the commissioner of insurance that the contractor is maintaining a membership in a qualified group-funded workers compensation pool, then, the principal shall not be liable for any compensation under this or any other section of the workers compensation act for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall have no right to file a claim against or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act. In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation. No insurance company shall charge a principal a premium for workers compensation insurance for any liability for which the contractor has secured the payment of compensation.

In *PMA Group*,⁵ the Kansas Supreme Court stated:

“The doctrine of equitable estoppel is based upon the principle that a person is held to a representation made or a position assumed when otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances, has in good faith relied thereon. [Citation omitted.]

“ . . . Equitable estoppel is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct. A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts”⁶

Common law equitable remedies, including estoppel, have been applied to the Workers Compensation Act.⁷

⁵ *PMA Group v. Trotter*, 281 Kan. 1344, 135 P.3d 1244 (2006).

⁶ *Id.* at 1352-53 (quoting *United State Bank & Trust Co., v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 527, 561 P.2d 792 [1977]).

⁷ See e.g. *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421 (2000); *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App. 2d 156, 928 P.2d 109 (1996).

ANALYSIS & CONCLUSION

Dore and Demolition Contractors were subcontractors of the principal contractor, United Excel. Both Dore and Demolition Contractors were contractually required to provide United Excel with certificates evidencing that they had valid and statutorily appropriate workers compensation coverage for their employees working on the Bethany Hospital demolition project. Claimant was an employee of Demolition Contractors. Demolition Contractors provided United Excel with a certificate of insurance which showed it had workers compensation coverage with Travelers. The Bethany Hospital work site in Kansas was specifically mentioned. This certificate of insurance was apparently obtained by Demolition Contractors from the insurance agency that procured the insurance policy with Travelers. The agent had apparent authority to sign the certificate of insurance for Travelers, and United Excel had no reason to doubt its authenticity or validity. It appeared valid on its face. And unlike in *Allied Mut. Ins. Co. v. Moeder*,⁸ United Excel, being a third party, never saw the actual insurance policy. Therefore, regardless of whether the insurance agent exceeded his authority or committed an error in providing the certificate of insurance, it was relied upon by United Excel in permitting Demolition Contractors' employees to perform work at the job site. Travelers is estopped from denying workers compensation insurance coverage of Demolition Contractors and claimant.

Under K.S.A. 44-503(g), the principal (United Excel) shall not be liable for any compensation where the subcontractor (Demolition Contractors) has secured workers compensation insurance coverage and claimant shall not file a claim against the principal for workers compensation benefits unless compensation is unavailable. Therefore, because compensation is available from Demolition Contractors and Travelers, United Excel and Builders and Dore and its insurance carrier (Nautilus) should not be liable.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award dated June 6, 2007, and the Award Nunc Pro Tunc dated June 8, 2007, entered by Administrative Law Judge Robert H. Foerschler are modified to find respondent Demolition Contractors, Inc., and Travelers Indemnity Co. liable for all workers compensation benefits, including the medical treatment expenses and permanent partial disability compensation awarded claimant. The ALJ's Award is otherwise affirmed.

⁸ *Allied Mut. Ins. Co. v. Moeder*, 30 Kan. App. 2d 729, 48 P.3d 1 (2002).

IT IS SO ORDERED.

Dated this _____ day of September, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Angela L. Williams, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent United Excel and its Insurance Carrier
Builders
Theresa A. Otto, Attorney for Insurance Carrier Travelers
Dore & Associates Contracting Co., Inc., 900 Harry Truman Parkway, Bay City,
Michigan, 48707
Demolition Contractors, Inc., 2315 Madison Street, Omaha, Nebraska, 68107
Robert H. Foerschler, Administrative Law Judge